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PP

v.

YEH ING HOEY & ANOR

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HIGH COURT SABAH & SARAWAK, MIRI
ZULKIFLI BAKAR J
[CRIMINAL TRIAL NO: 45-05-2004 (MR)]
27 SEPTEMBER 2012

C

CRIMINAL LAW: *Dangerous Drugs - Trafficking in dangerous drugs - Accused persons accused of trafficking in 339.5g of methamphetamine - Whether there was common intention - Incriminating drugs found at front seat foot well of vehicle - Whether accused persons had control, knowledge and physical possession of drugs - Whether prima facie case established -*

D

Dangerous Drugs Act 1952, s. 39B(1)(a)

CRIMINAL PROCEDURE: *Acquittal or discharge - Acquittal of accused without calling for defence - Vehicle stopped by patrolling police at road side and taken to police station - Incriminating drugs found at front seat foot well - Whether vehicle searched at road side or police*

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station - Whether drugs discovered at road side or police station - Second accused was front seat passenger - Whether second accused had control and knowledge of drugs found - Whether close proximity of second accused to place where drugs discovered sufficient to incriminate him - Whether

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second accused had physical possession of drugs

EVIDENCE: *Contradictory evidence - Contradicting evidences between parties - Incriminating drugs found at front seat foot well of vehicle - Whether drugs discovered at road side or police station - Probable version to be adopted by court*

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While patrolling along the security area of a shopping mall, a police party spotted a vehicle ('the vehicle') belonging to a suspected drug addict. The vehicle, which was driven by the first accused with the second accused as the front seat passenger, was

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eventually stopped. According to the prosecution witnesses, the police party did not search the vehicle at the compound of the shopping mall but instead drove to the Central Police Station ('CPS') whereby both the accused persons sat at the rear passenger seat and the front passenger seat was left vacant. At

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the CPS, a search conducted revealed an orange plastic bag ('the plastic bag') containing two transparent plastic packets of crystallised substance suspected to be *syabu*, at the far end of the

front seat's foot well. Subsequently, the two accused persons were charged under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') for trafficking in 339.5g of methamphetamine with common intention. At the end of the prosecution's case, the second accused was acquitted and discharged but the first accused, who was the beneficial owner of the vehicle, was called to enter his defence. The first accused stood alone to the charge and the issue of common intention was a foregone conclusion. In his defence, the first accused submitted that on the day when he was stopped by the police party, his BMW car had broken down and he had to wait for one Sarudin ('PW17') to fetch him up with the vehicle in question. After meeting with a land broker, the first accused proceeded to fetch the second accused at the shopping mall where the two were stopped by the police. Contrary to the prosecution's evidence that the search was conducted at the CPS, the first accused alleged that he, along with the second accused, was subjected to a body search at the road side of the shopping mall, immediately after the vehicle was stopped by the police. When nothing incriminating was found on either of them, the accused persons were then driven to the CPS and a further search was carried out, leading to the discovery of the drugs and their respective arrests.

Held (acquitting and discharging both accused):

(1) The evidence against the second accused did not show that he could exercise control over the drugs and far more to suggest or infer that he had knowledge of their existence since he had no control of the vehicle apart from being a mere passenger and without evidence what so ever that he had anything to do with the said drugs. The prosecution did not adduce any other evidence which could have led to a finding of possession of the drugs against the second accused other than his mere presence in the vehicle. The fact that, *inter alia*, the drugs were found to the close proximity of the second accused when he was seated at the front passenger seat was insufficient to find that the second accused had physical possession of the said drugs. (paras 19 & 22)

(2) The evidence of an investigating officer ('PW8') disclosed that the vehicle was searched at the road side of the shopping mall. Even though he was not at the shopping mall, it was obvious that PW8 must have gathered this fact from the witnesses statements. Unfortunately, PW8 was not called by any party

A at the trial as to how he found out about this fact. Facing two contradicting versions, the court adopted the version most favorable to the defence which was supported by the prosecution's very own witness, PW8. (para 44)

B **(3)** Had there been a search conducted at the road side of the shopping mall, the police party would have found the drugs there and then and both accused persons would have been arrested and handcuffed. After all, policemen are trained to search and incriminate items and/or evidence. The failure C rendered the story of the plastic bag being discovered at the CPS untrue and the evidence of the discovery of the drugs at the far end of the foot well of the front passenger seat doubtful. (paras 46 & 48)

D **(4)** If the plastic bag was at the foot well all along, the first accused would have noticed it when PW17 came to fetch him and so would the second accused since he was seated at the front passenger seat of the vehicle. In fact, both accused could have stepped onto the plastic bag if it was there at all times. The conclusion was that the plastic bag was not there E at all when the vehicle was stopped and detained. (paras 46 & 48)

Case(s) referred to:

Abdullah Jacomah v. PP [2002] 8 CLJ 1 HC ***(refd)***
F *Balachandran v. PP [2005] 1 CLJ 85 FC* ***(foll)***
Chan Pean Leon v. PP [1956] 1 LNS 17 HC ***(refd)***
Dato' Mokhtar Hashim & Anor v. PP [1983] 2 CLJ 10; [1983] CLJ (Rep) 101 FC ***(refd)***
Ho Seng Seng v. Rex [1951] 1 LNS 25 HC ***(refd)***
Leow Nghee Lim v. Regina [1955] 1 LNS 53 HC ***(refd)***
G *Lim Beng Soon v. PP [2000] 4 SLR 589* ***(refd)***
Mohamad Yazri Minhat v. PP [2003] 2 CLJ 65 CA ***(refd)***
Ong Ah Chuan v. PP & Koh Chai Cheng v. PP [1980] 1 LNS 181 ***(refd)***
PP v. Abdul Manaf Muhamad Hassan [2006] 2 CLJ 129 FC ***(refd)***
PP v. Kang Ho Soh [1991] 3 CLJ 2914; [1991] 3 CLJ (Rep) 557 HC
H ***(refd)***
PP v. Law Fen Kang [2006] 8 CLJ 436 HC ***(refd)***
PP v. Quek Cher Jiang & 2 Ors [2003] 1 LNS 691 HC ***(refd)***
PP v. Saimin & Ors [1971] 1 LNS 115 HC ***(refd)***
Ramis Muniandy v. PP [2001] 3 SLR 534 ***(refd)***
Tan Ah Tee & Anor v. PP [1978] 1 LNS 193 HC ***(dist)***
I *Tong Peng Hong v. PP [1955] 1 LNS 165 HC* ***(refd)***
Zulfikar Mustaffah v. PP [2001] 1 SLR 633 ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 182A
Dangerous Drugs Act 1952, ss. 2, 37(d)
Evidence Act 1950, s. 114(g)

Reported by Najib Tamby

JUDGMENT

Zulkifli Bakar J:

The Charge

[1] The charge against both the accused is as follows:

> You are charged at the instance of public prosecutor and the charge against you is as follows:
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> Charge
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> That you, in furtherance of the common intention of you all, on 14th day of January, 2004 at about 10.25am, at the compound of the Central Police Station, Miri, in the District of Miri, in the State of Sarawak, on your own behalf, did traffic in dangerous drugs, to wit, 339.5grams of Methamphetamine, and thereby committed an offence under section 39B(1)(a) of the Dangerous Drugs Act, 1952 punishable under section 39B(2) of the same Act, read together with section 34 of the Penal Code.

[2] The facts of the case as presented by the prosecution witnesses are that at 10.15am. On 14 January 2004, PW6 together with a police party consisting of PW5, PW7, PW11 and Kpl Lim Sin Min (deceased) were on patrol in a vehicle at the security area of Imperial Mall, Miri Town. Whilst on patrol PW6 was informed by PW7 that he saw a vehicle type Toyota Hilux twin cabins black in colour belonging to a suspected drug addict. PW6 then instructed PW7 together with PW11 to alight from his vehicle and to detain the said Toyota Hilux and to have it brought to police station. At that time the condition of the compound of Imperial Mall was quite busy with traffic and the said Toyota Hilux was two cars apart in front of PW6's vehicle. As the Toyota Hilux was moving forward slowly within the compound of Imperial Mall, PW7 and PW11 ran towards it and stopped the said vehicle. There were two male person in it and later identified as the first accused as the driver and second accused as the passenger at the front passenger seat.

[3] PW7 instructed the first accused to descend from the driver's seat of the Toyota Hilux and to sit at the rear seat of the said vehicle. PW11 instructed the second accused to do the same. PW7 then got into the driver's seat of the said vehicle whilst PW11 was seated at the rear seat together with both the accused. The Toyota Hilux was driven by PW7 to the Central Police Station (CPS) Miri followed by PW6 with the remaining police party in their vehicle. The two vehicles arrived there simultaneously.

[4] At the compound of CPS Miri, PW6 instructed PW7 to conduct a body search on both the accused person but nothing incriminating was found on them. The identity cards of both the accused persons were taken by PW7 and handed over to PW6. The first accused was identified as Yeh Ing Hoey and the second accused as Bong Khiuk Pin.

[5] Subsequently PW6 directed PW7 to conduct a search in the said Toyota Hilux. The search started from the driver's compartment and nothing incriminating was found. PW7 then proceeded to search at the right rear compartment of the vehicle and nothing incriminating was found. At the left rear compartment of the vehicle was also searched and here too nothing incriminating was found. PW7 then proceeded to search at the front left passenger seat where PW7 found an orange plastic bag (P6C) tied with its handle on the floor mat at the far end of the foot rest. PW7 handed it over to PW6. PW5 who were guarding both the accused persons testified that during search being conducted, both of them reacted restlessly. PW6 testified that the two accused persons were in a dreadful and restless manner and sweating.

[6] PW6 then untied the knot of the handle of the orange plastic bag and saw inside the said plastic bag a package of Chinese newspaper (P6D) and upon opening it he saw inside it two transparent plastic packets (P6E) containing crystalline substance (P6B) suspected to be syabu. PW6 said at this point in time both the accused persons were more restless, more dreadful and perspiring profusely. PW5 said both the accused persons looked pale and nervous. PW6 then showed the two transparent plastic packets containing the substance to both accused persons upon which first accused said something but it was ignored by him. PW6 then repacked the two transparent plastic packets containing the substance into the Chinese

newspaper and place it into the orange plastic bag and tied with its handle. PW6 took possession of these items into his safe custody whilst both the accused persons were handcuffed.

[7] PW6 testified that upon information received (from the accused persons which I ruled not admissible), PW6 instructed PW5, PW7, PW11 and Kpl Lim (deceased) to go to Imperial Hotel & Suites to conduct a search at the suite apartment.

[8] PW7 drove the Toyota Hilux whilst PW6 was seated at the front passenger seat holding the orange plastic bag. At the rear seat of the said vehicle were PW11 with both the accused persons seated on his right. PW5 and Kpl Lim followed in another vehicle.

[9] Upon arrival at the car park in the basement of the Imperial Suite Apartment, PW6 passed the orange plastic bag in its tied condition to PW5 for his custody. The two accused persons remained in the Toyota Hilux guarded by PW5 and Kpl Lim whilst PW6 together with PW7 and PW11 proceeded to a room at the Imperial Suite Apartment.

[10] About two and a half hours later PW6 returned to the Toyota Hilux and PW5 handed back the orange plastic bag to PW6. PW5 testified he did not open the tied orange plastic bag when it was in his custody. The police party then took both the accused persons back to CPS Miri with the orange plastic bag in the custody of PW6.

[11] Upon arrival at CPS Miri PW6 brought the orange plastic bag to the Narcotic Department of CPS Miri together with the accused persons guarded by the police party. There, PW6 placed the orange plastic bag on a table in front of the accused persons. PW6 then untied the orange plastic bag and took out the newspaper package and the two transparent plastic packets and then weighed them. PW6 then made the markings on the items. PW6 repacked the items and placed on the table in front of the accused persons.

[12] Subsequently PW12 (police photographer) came to see PW6 as he was instructed by PW8 (Chief Inspector Alekzandra @ Muhamad bin Dawam) to take photograph of the exhibits. PW6 had earlier informed PW8 about the arrest of the two accused persons. PW6 took the exhibits ie, P6C, P6D and P6E from the table and instructed PW7 to escort both accused persons to the

Toyota Hilux parked at the compound of CPS Miri. There, PW7 opened the front left door of the vehicle and PW7 untied the orange plastic bag and took out the newspaper package containing the substance and placed it on to the floor mat. PW6 held the orange plastic bag with him. PW12 snapped photographs (P16B, P16C and P16D) of the items placed there upon supervision of PW6 and in the presence of both the accused persons. After the photographs were taken, PW6 then repacked the items and placed them into the orange plastic bag and tied its handle.

[13] After that PW6 together with PW7 taking the two accused persons with him and PW12 went back to the Narcotic Office where PW12 took photographs of other exhibits (P16A) such as cash money (P20), ATM card (P18), ignition key (P17) to the Toyota Hilux and cell phones. PW6 testified that the items apart from P17 were found by him from the armrest of the said Toyota Hilux. PW12 then left the Narcotic Office. PW6 placed all the exhibits in an envelope and placed it on the table. P6 then lodged a police report *vide* 678/04 CPS Miri (P21) and prepared a search list (P22).

[14] PW6 then instructed PW7 and PW17 to escort the two accused persons to be placed in the CPS Miri lock-up. PW6 then took the envelope containing the exhibits to his office at the Narcotic Office at IPD Miri and kept them in his steel cabinet under lock and key. The Toyota Hilux (P23) was later parked at the Narcotic Department IPD, Miri.

[15] On 16 January 2004 at about 8.30am, PW6 handed over the exhibits to PW8 who was the investigating officer of this case at this Narcotic Office IPD Miri.

[16] It is pertinent to note that from the evidence of the prosecution which was maintained throughout the trial is that the police party did not at any time search the Toyota Hilux when it was first detained at the compound of the Imperial Mall. After it was detained both the accused persons were instructed to be seated at the rear passenger seat guarded by PW11. There was no one seated at the front passenger seat whilst PW7 drove the Toyota Hilux to CPS Miri. It is also important to note that the drugs were found at the far end of the foot well of the foot rest of the front passenger seat.

[17] At the stage of the prosecution's case I have my reservations on these kind of evidence which I think it was tailored to suit the facts of the prosecution's case that it was not possible for PW7 and PW11 to discover the drugs and they did not search the vehicle. Furthermore, the drugs could not have been visible to PW7 who was driving the Toyota Hilux to CPS Miri as it was placed at the far end of the foot rest under the glove compartment. Therefore the second accused is made to be in possession of the drugs as he was earlier seen seated at the front passenger seat by the police witnesses and this is undisputed facts. It is very suspicious as to why the police did not search the Toyota Hilux when it was detained at the Imperial Mall whilst there is evidence that, the body search of the two accused persons were made at the road side of car parking area of the Imperial Mall. (See evidence of PW8). This is yet another reservation I made when I was considering the case by the prosecution.

[18] For the sake of brevity (and frankly) at the close of the prosecution's I had intended to acquit and discharge both the accused persons after considering the evidence adduced which are tainted with inconsistencies but I reminded myself that inconsistencies do occur in almost all cases due to human fallibilities. As much as we consider it is unfair to convict an innocent man it is equally so to acquit a guilty man due to such shortcomings when there are other evidence that may support the evidence of his guilt.

[19] In the circumstances despite of acquitting both the accused persons at the close of the prosecution's case I decided to acquit the second accused who merely happened to be a passenger of the Toyota Hilux without more. The prosecution did not adduce any other evidence which can lead to a finding of possession of the drugs against the second accused other than his mere presence in the Toyota Hilux. The fact that the drugs were found to the close proximity of the second accused when he was seated at the front passenger seat, being restless, dreadful and perspiring after his arrest during the inspections of the Toyota Hilux under the sun at the parking space of the compound of CPS Miri to my mind is insufficient to find that the second accused has physical possession of the said drugs. The evidence in this case could not in any way suggest any presumption of possession under the law against the second accused.

[20] In the case of *Chan Pean Leon v. PP* [1956] 1 LNS 17; [1956] MLJ 237, the court have once said,

> To establish possession from the purposes of criminal law, two separate questions are involved. The first in whether the accused party was in possession of the article in question and second, by reason of the maxim *actus non facit reus nisi mens sit rea* is whether he had knowledge of the thing possessed.

[21] And in the case of *Leow Nghee Lim v. Regina* [1955] 1 LNS 53; [1956] MLJ 22 at p. 30 the court said,

> Probably the most helpful definition of possession is:
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> The relation of a person to a thing over which he may at his pleasure exercise such control as the character of the thing admits, to the exclusion of other persons. This definition does not express, but it does imply that the meaning of the word includes some element of knowledge.

[22] These two cases many have been decided a decade ago but what have been said in them are still a good law. In our instant case the evidence against the said accused did not show that he could exercise control over the drugs at the foot well of the foot rest of the Toyota Hilux and far more to suggest or infer that he has knowledge of the existence of the drugs since he has no control of the vehicle Toyota Hilux apart from being a mere passenger and without evidence what so ever that he has anything to do with the said drugs. (*Tan Ah Tee & Anor v. PP* [1978] 1 LNS 193; [1980] 1 MLJ 49 is referred and distinguished).

[23] I therefore consider that it is justified to acquit and discharge the second accused at the close of the prosecution's case without hesitation.

[24] Despite my reservations as to the evidence adduced by the prosecution in this case I have decided to call upon first accused to enter his defence on the charge above and therefore the issue of common intention is a foregone conclusion ie, the first accused now stood alone to the charge preferred in this case.

[25] I am persuaded to do so because there are evidence by the prosecution that the first accused is the beneficial owner of the Toyota Hilux at that point in time he was driving the said vehicle and in that vehicle the drugs were found. In the case of the first accused, to my mind the prosecution have more evidence against him apart from the limited evidence against the second accused which are applicable to the first accused.

[26] The first accused in his defence decided to testify under oath and called evidence of witnesses. In calling for the defence of the first accused I am guided by the decision of the Federal Court in *Balachandran v. PP* [2005] 1 CLJ 85; [2005] 2 MLJ 301 that;

> As the accused can be convicted on a *prima facie* evidence it must have reached a standard which is capable of supporting a conviction beyond a reasonable doubt. **However it must be observed that it cannot at that stage, be properly described as a case that has been proved beyond reasonable doubt...** (emphasis added).

[27] Therefore in the case such as this, where the prosecution is relying on s. 37(d), of the Dangerous Drugs Act 1952 for possession and s. 2 of the same Act for trafficking I am mindful of the definition of the word "trafficking" which reads:

> "trafficking" includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drugs.

[28] In the instant case the relevant overt act could be attributed to the word "transporting" since from the evidence of the prosecution thus far, the first accused being the beneficial owner and was the one driving of the Toyota Hilux in which the drugs was found. The first accused can be said, at this stage, to be in custody of the said drugs in the Toyota Hilux of which he is in control and trafficking the drugs by transporting it using the said vehicle.

[29] Lord Diplock in the case of *Ong Ah Chuan v. PP & Koh Chai Cheng v. PP* [1980] 1 LNS 181; [1981] 1 MLJ 64 said:

> "Transport", although it must involve possession of the drugs by the person who transports them, is the only member of the heptad of verbs that is not inconsistent with the retention of possession of the drugs by him after their transport, it must mean moving the drugs from one place to another; it may mean moving them also to another person but it need not do so.
>
> Generally, in the absence of an express admission by the accused, the purpose with which he did an act is a matter of inference from what he did. Thus, in the case of an accused caught in the act of conveying from one place to another controlled drugs in a quantity much larger than is likely to be needed for his own consumption the inference that he was transporting them for the

A purpose of trafficking in them would, in the absence of any plausible explanation by him, be irresistible--even if there were no statutory presumption…

[30] I have also referred the judgments in cases of *Mohamad Yazri Minhat v. PP* [2003] 2 CLJ 65; [2003] 2 MLJ 241, *PP v. Abdul Manaf Muhamad Hassan* [2006] 2 CLJ 129, *Ramis Muniandy v. PP* [2001] 3 SLR 534, *Tan Ah Tee & Anor v. PP* [1978] 1 LNS 193; [1980] 1 MLJ 49, *Zulfikar Mustaffah v. PP* [2001] 1 SLR 633, *Lim Beng Soon v. PP* [2000] 4 SLR 589, *PP v. Kang Ho Soh* [1991] 3 CLJ 2914; [1991] 3 CLJ (Rep) 557; [1992] 1 MLJ 360, *Tong Peng Hong v. PP* [1955] 1 LNS 165, *Ho Seng Seng v. Rex* [1951] 1 LNS 25; [1951] MLJ 225 and last but not least the case of *Leow Nghee Lim v. Regina* [1955] 1 LNS 53; [1956] MLJ 22.

[31] In *Leow Nghee Lim v. Regina (supra)*, Taylor J said:

> … that if a man has custody or control of a drug the onus of proving, first that he did not have possession, and secondly that he did not know the nature of the drugs, shall be shifted to him.

[32] The first accused in his defence called five witnesses including himself to testify under oath. In the morning of 14 January 2004 the first accused (DW1) testified that he received a phone call from Bujang (DW2) a land broker who had asked to meet up with him in Miri town at Beautiful Jade Centre at 9am concerning a sale of land. The place of the meeting was at one Indian coffee shop next to Hua Leong Café. DW1 who was also a land broker at that time owned a BMW car (D2) told DW2 that his car had broken down and he had to wait for Sarudin (PW17) to fetch him up. Sarudin (PW17) later came driving a Toyota Hilux (P23) ie, the vehicle where the drugs were found) and fetch DW1 at his house at Taman Tunku and they both went to the said Indian coffee shop. Upon arrival there both DW1 and PW17 alighted from the Toyota Hilux (P23) and proceeded to the Indian shop where DW2 was already waiting.

[33] Not long after that during their discussions about the land deal, DW1 received a phone call from DW3 (ex second accused) asking DW1 to fetch him from the Imperial Mall at the front of the lobby of Imperial Hotel.

[34] DW1 agreed to fetch DW3 to bring him over for a drink at the same Indian coffee shop. DW1 then borrowed the Toyota Hilux (P23) from PW17 and drove to the Imperial Mall to fetch DW3.

[35] DW1 went to the Imperial Mall driving the Toyota Hilux (P23) to fetch DW3 who boarded the vehicle and sat at the front passenger seat. As the Toyota Hilux (P23) driven by DW1 approaching the payment booth of the parking areas of the shopping mall, it was stopped by PW7 and PW11. Consistent as in the evidence during the prosecution's case, both DW1 and DW3 were directed to move to the rear passenger seat by DW7 and DW11 except that DW1 and DW3 said that a search was conducted on the Toyoto Hilux (P23) apart from body search conducted on them and nothing incriminating was found at the area of the shopping mall. PW7 then drove the Toyota Hilux (P23) with DW1 and DW3 seated at the rear seat of the vehicle whilst PW11 was seated at the front passenger seat.

[36] Upon arrival at the parking lot of CPS Miri a further search was made on the Toyota Hilux by PW7 and this time an orange plastic bag containing Chinese newspaper which contained plastic packets with the drugs inside them were discovered. DW1 and DW3 were both arrested and handcuffed.

[37] The defence also called for evidence of DW4 and DW5 to testify and tendered a number of exhibits in support of the defence case.

[38] At this stage I am mindful of the provision of s. 182A of the Criminal Procedure Code which reads as follows:

> (1) At the conclusion of trial, the Court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt.
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> (2) If the Court finds that the prosecution has proved its case beyond reasonable doubt, the Court shall find the accused guilty and he may be convicted on it.
>
> (3) If the Court finds the prosecution has not proved its case beyond reasonable doubt, the Court shall record an order of acquittal.

[39] Since I have called upon the first accused in this case to enter his defence, it would mean that I have found that there is a *prima facie* case against him. As I have discussed earlier in this judgment that I have some reservations on some evidence adduced by the prosecution I still require at this stage for the defence to raise a reasonable doubt in the prosecution's case. Although the evidence of the prosecution were tainted with discrepancies I found that they are not so serious as to be termed as "contradictions" that had caused the prosecution's case to collapse against the first accused at the prosecution stage. Therefore the truth of the prosecution's case can only be overthrown not by a mere doubt but by a reasonable doubt raised by the defence.

[40] In *PP v. Saimin & Ors* [1971] 1 LNS 115; [1971] 2 MLJ 16 the court had summons up the duty of the defence as:

> … A reasonable doubt must be doubt arising from the evidence or want of evidence and cannot be imaginary doubt or conjecture unrelated to evidence.

[41] In *Dato' Mokhtar Hashim & Anor v. PP* [1983] 2 CLJ 10; [1983] CLJ (Rep) 101; [1983] 2 MLJ 232 the Federal Court said:

> … The test to apply at the end of the defence is still normal test, that is whether the defence has cast a doubt on the truth of the prosecution story. To warrant an acquittal however the doubt created must not merely be a fleeting doubt or a capricious doubt but a doubt in respect of which a substantial reason can be given. The question now is – has the defence evidence created a reasonable doubt on the truth of the prosecution story?

[42] In *Abdullah Jacomah v. PP* [2002] 8 CLJ 1; [2002] 6 MLJ 324 the court said:

> … The law governing a proper appraisal of a defence that had been advance is well settled. It requires a consideration of all evidence that have been adduced in support of the defence (see *Chang Lee Swee v. PP* [1985] 1 MLJ 75; *Mohamad Shariff v. PP* [1964] MLJ 64). A court must consider carefully whether a defence that has been put forward is capable of raising a reasonable doubt in the prosecution's case …

[43] In the circumstances I have to re-look and re-evaluate the prosecution's evidence in the light of the defence evidence and decide whether the defence had succeeded to overthrown the truth of the prosecution's case.

[44] According to DW1 and DW3 the vehicle Toyota Hilux was searched at the road side immediately after it was stopped by the police but PW7 and PW11 testified otherwise. There is evidence of PW8, the investigating officer of this case who testified, that from his investigations into this case he found that the vehicle was searched at the road side of the shopping mall. PW8 was not there at the shopping mall when the vehicle was stopped and how does he know this fact? It is obvious that PW8 as an investigating officer had access to the witnesses statements in the investigation paper and he must have known this fact from the witnesses statements. Unfortunately PW8 was not asked by any party at the trial as to how did he find out about this fact. Be as it may, this court is faced with two contradicting versions and I have chosen to adopt the version most favourable to the defence and hence I believe the version of the defence which is supported by prosecution's very own witness (PW8).

[45] In deciding to believe the evidence of the defence that the Toyota Hilux was searched at the precinct of the shopping mall, it would mean at this stage I will have to treat the evidence of PW7 and PW11 in this aspect and all other aspect related to it with cautious.

[46] This leads to the question of the orange plastic bag containing the drugs which was said to be discovered at the far end of the foot well of the front passenger seat of the Toyota Hilux. Had there been a search conducted at the road side of the shopping mall, the police party would have found it there and then, both the accused persons would have been arrested and handcuffed and therefore the story of the orange plastic bag containing the drugs was only discovered at the CPS Miri had now become untrue. In the circumstances the evidence of the prosecution that the orange plastic bag containing the drugs was at the far end of the foot well of the front passenger seat all the time has become doubtful. Appraising the evidence at a different angle, had the orange plastic bag was at the foot well of the front passenger seat all the times, first accused (DW1) must have noticed it when PW17 fetched him from his house to the coffee shop.

[47] So as the second accused (DW3) since he was seated at the front passenger seat of the Toyota Hilux. In fact both DW1 and DW3 could have stepped onto the orange plastic bag if it was there all the times. At this stage I realise the reason why

PW11 and PW7 had testified that they did not search the vehicle at the shopping mall and PW11 was seated at the rear seat of the vehicle to travel to CPS Miri ie, to suggest to this court that the orange plastic bag containing the drugs was there all the time and they did not notice it until PW7 discovered it at the CPS Miri.

[48] I have not failed to appraise the facts that PW11 had told this court that he had opened the front passenger door of the said vehicle after it was stopped and ordered DW3 (second accused) to alight and to sit at the rear seat. So as the evidence of PW7 who had ordered DW1 (first accused) to do the same and subsequently took over the steering wheel and drove the Toyota Hilux to CPS Miri. Before driving it PW7 has testified that he had made observations of the front compartment of the vehicle for any weapon. Since these events had taken place, I am sure PW11 and PW7 must have noticed the orange plastic bag resting on the foot well of the front passenger compartment as it was not hidden and conspicuous to the naked eyes. After all the policemen are trained to search and locate incriminating items and/or evidence. It goes to the conclusion that the plastic bag containing the drugs was not there at all when the vehicle was stopped and detained.

[49] If it was not there all the time and only discovered at the CPS Miri would it mean that it was planted by the police at CPS Miri? I do not wish to make a finding on this as there was not a slightest averment by the defence to that effect except by way of submissions. Suffice for me to say that the defence had raised a reasonable doubt in the prosecution's case. It is also not fair to cast the police with such adverse and serious allegation when there is no evidence or circumstances to justify the same.

[50] In *PP v. Quek Cher Jiang & 2 Ors* [2003] 1 LNS 691 the court held:

> The trafficking charge is in relation to the packet of heroin found on the footrest of the front passenger seat
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> In relying on the presumption of trafficking under s. 37(da) the prosecution cannot rely on s. 37(d) of the Act to prove possession…
>
> By reason thereof the prosecution must prove possession by physical evidence and from inferences that may be drawn from such physical evidence.

> ... he found the bag at the footrest of the front passenger seat – hence it is a conspicuous place and therein was not in any concealed compartment to attract to provision s. 37(h) deeming the accused as the person in charge of the car to have knowledge it has been so concealed.

[51] Even it is true that the first accused is the beneficial owner of the Toyota Hilux which was registered in the name of PW17, the court in the case of *PP v. Law Fen Kang* [2006] 8 CLJ 436 had said:

> To my mind even though the accused was the registered owner and driver of the car at the relevant and material time, it cannot be irrefutably inferred that the accused possessed the requisite knowledge of the presence of the drugs inside his car.

[52] By the foregoing reasons I found that the first accused had raised the requisite reasonable doubt in the prosecution's case which entitled him to acquittal.

[53] Since I have found as above, to my mind which is decisive for the purpose of the charge against the first accused the other issues raised at this trial will not change the above result.

[54] Other issues such as break in chain of evidence in respect of the exhibits, the non calling Ha How Ping which attracted s. 114(g) of the Evidence Act 1950, the possibility of mix-up of exhibits found in the Toyota Hilux and in a room at the Imperial Suite Apartment, both accused were seen dreadful, restless and perspiring, whether the plastic bag was orange or red in colour, non production of other photographs allegedly taken by the police, the exact place of detention of both the accused persons to determine the exact place of possession of the drugs that affect the charge against them and the non taking of nail clippings and finger prints; although may be relevant and important to the given facts and circumstances of certain cases but for this case they have not become utmost importance for its conclusion.

[55] I therefore made the order of acquittal and discharge against the first accused as I am satisfied that the first accused had succeeded to raise a reasonable doubt in the prosecution's case on the charge preferred against him.